Petition

81-1014

Office-Supreme Court, U.S.
FILED
NOV - 6 1981
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

No._____

HARRY O'BRIEN,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE NINTH CIRCUIT COURT OF APPEALS

PAUL D. PRIAMOS

5140 Birch Street
First Floor
Newport Beach, Ca 92660

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

No._____

HARRY O'BRIEN,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE NINTH CIRCUIT COURT OF APPEALS

PAUL D. PRIAMOS

5140 Birch Street
First Floor
Newport Beach, Ca 92660

QUESTIONS PRESENTED

1. Whether or not the DEA Agents had probable cause to arrest defendant HARRY O'BRIEN or whether they violated his Fourth Amendment rights?
2. Whether or not the magistrate issued search warrants, without probable cause, and based upon a defective affidavit signed by a DEA agent in violation of defendant HARRY O'BRIEN's Fourth Amendment rights?
3. Whether or not a Bruton violation occured at joint trial of defendant HARRY O'BRIEN and other defendants when a co-defendants confession inculpating the defendant HARRY O'BRIEN was allowed in evidence at the tiral in violation of his Sixth Amendment rights?

4. Whether or not defendant HARRY O'BRIEN's Sixth Amendment right to effective Counsel was violated at the Motion To Suppress Hearing and Trial?

5. Whether or not the prosecution made remarks during his closing argument which prejudiced defendant HARRY O'BRIEN's case before the jury in such a manner that his Fifth Amendment rights to a fair trial was violated?

LIST OF ALL PARTIES

80-1224; 80-1261; 80-1170, U.S.A. v. HARRY O'BRIEN, JAMES R. BROWN, CLIFFORD DOYLE LEE.

The undersigned, counsel of record for defendant HARRY O'BRIEN certifies that the following listed parties have an interest in the outcome of this case. These representations are made to enable judges of the court to evaluate possible disqualifications or recusal.

Defendants	Counsel for Defendants
1. Harry O'Brien	1. Paul D. Priamos
2. James R. Brown	2. Jerome M. Polaha John L. Conner
3. Clifford Doyle Lee	3. Lawrence J. Semenza

Paul D. Priamos
PAUL D. PRIAMOS,

Attorney of record for defendant HARRY O'BRIEN.

TABLE OF CONTENTS

		Page
1.	Questions Presented for Review . .	i
2.	List of All Parties	iii
3.	Table of Contents	iv - v
	Table of Authorities	vi - vii
4.	Opinions Below	1
5.	Jurisdiction	1
6.	Constitutional Provisions	1
7.	Statement of Case	1
8.	Reasons for Granting the Writ of Certiorari	10
	A. The DEA Agents Did Not Have Probable Cause to Arrest Defendant HARRY O'BRIEN . . .	10
	B. The Search Warrants Were Issued Without Probable Cause and Affidavit Signed By a DEA Agent Was Defective	26
	C. The Conviction of Defendant HARRY O'BRIEN at His Joint Trial Should be Set Aside Due to a Codefendant's Confession Inculpating the Defendant HARRY O'BRIEN.	37
	D. The Trial Counsel for Defendant HARRY O'BRIEN Was Ineffective at the Motion to Suppress Hearing and Trial.	46

Page

E. The Prosecution Made Remarks During His Closing Argument Which Prejudiced Defendant HARRY O'BRIEN's Case Before the Jury in Such a Manner That a New Trial Should Be Granted . . 52

Conclusion 60

Appendix A - Opinion of the Ninth Circuit Court of Appeals a-1

TABLE OF AUTHORITIES CITED

Cases	Page
Aguilar v. Texas 378 U.S. 108	12, 14 36, 47
Beck v. State of Ohio 379 U.S. 89, 98	25
Bruton v. United States 391 U.S. 123	38, 40
Draper v. United States 358 U.S. 307,313	12
Henry v. United States 361 U.S. 98	25
Johnson v. United States 333 U.S. 11	25
Mapp v. Ohio 367 U.S. 643	19
McCrary v. Illinois 386 U.S. 300	15
Rugendorf v. United States 376 U.S. 528	26
Spinelli v. United States 393 U.S. 410	16, 36 47
Terry v. Ohio 392 U.S. 1	17
United States v. Astroff 556 F2d 1369	35
United States v. Chadwick 393 F Supp 763	12

Cases	Page
United States v. Drumond (2nd Cir) 481 F 2d 62	58
United States v. Eagles (9th Cir) 571 F 2d 1069	39
United States v. Herrera 531 F 2d 788	54
United States v. Lamersen 457 F 2d 371, 372	56
United States v. Morris 568 F 2d 396, 403	57
United States v. Santos (9th Cir) 430 F 2d 1295	40
United States v. Stewart 579 F 2d 356, 359	38, 40
United States v. Sturgis 578 F 2d 1296	59
Wong Sun v. United States 371 U.S. 471	19
Zuck v. Alabama 588 F 2d 436	51

STATUTES

Federal Rules of Criminal Procedure Rule 14	38
Rule 41(c)	36
Rule 103(d)	52, 59
Rule 801(d)(2)(E)	39

Opinions Below

The opinion of the Ninth Circuit Court of Appeals of the United States, attached hereto as Appendix A, is not officially reported.

Jurisdiction

After rendition of the decision by the Ninth Circuit Court of Appeals on September 10, 1981 in the United States v. HARRY O'BRIEN, the Defendant - Petitioner timely invokes the jurisdiction of this Court to review this decision under 28 United States Code Section 1254, since the defendant was convicted in a criminal case and claims that his rights under the United States Constitution have been violated.

Constitutional Provisions Involved

A. The right of the people to be secure in their persons, houses papers, and

effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment IV United States Constitution

B. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger nor shall person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be

taken for public use, without just compensation.

Amendment V United States Constitution

C. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment VI United States Constitution

Statement of Case

The United States District Court for the District of Nevada had original jurisdiction under Title 18 U.S.C. Section 3231 and Rule 18 of the Federal Rules of Criminal Procedure.

This is an appeal by the Defendant-Petitioner from the judgment of Conviction of the Defendant rendered in the United States District Court for the District of Nevada.

The Defendant-Petitioner, along with co-defendants JAMES R. BROWN and CLIFFORD DOYLE LEE were arrested on September 14, 1979. The Defendant-Petitioner was charged in an Indictment with violating in Count I, Section 1952(a)(3) Title 18, United States Code, in Count II, Section 841(a)(1) Title 21, United States Code, in Count V, Section 846 Title 21, United States Code. The Defendant-Petitioner, at all times was represented by private counsel, pleaded

not guilty. A Motion To Suppress Hearing was heard on January 7, 1980 in the United States District Court for the District of Nevada, Honorable EDWARD C. REED, JR., Judge Presiding. Judge EDWARD C. REED, JR. denied Defendant - Petitioner's Motion To Suppress on January 11, 1980. On January 22, 1980 defendant HARRY O'BRIEN made a motion for severance. On January 23, 1980 the Court denied the motion. A trial by jury commenced on January 24, 1980 in the United States District Court for the District of Nevada, Honorable EDWARD C. REED, JR., Judge Presiding. On January 30, 1980 a jury found Defendant - Petitioner guilty as charged on all three counts.

On March 10, 1980 the court sentenced Defendant - Petitioner HARRY O'BRIEN to five years as to Count 1(18:1952(a)(3)); five years and three years special parole as to Count 2(21:841(a)(1)); five years and three years special parole as to Count 5(21:846); and all three sentences to run

consecutive. Later the Court corrected his sentence by terminating three years special parole as to Count 5(21:846).

Defendant - Petitioner timely filed a Notice of Appeal on March 18, 1980. An appeal was taken to the Ninth Circuit Court of Appeals for the United States, during which time Defendant - Petitioner was free on bail. On September 10, 1981, the Ninth Circuit Court of Appeal of the United States of America affirmed the judgment of conviction.

Defendant - Petitioner timely invokes the jurisdiction of this Court to review the decision under 28 United States Code Section 1254, since the Defendant - Petitioner was convicted in a criminal case, and claims that his rights under the United States Constitution have been violated.

On or about September 14, 1979 Special Agent LEWIS F. THOMAS and Special Agents DAVID ROBERT MATZ and BRUCE RICHARD GATES of the Drug Enforcement Administration (DEA) observed a 1978 Cadillac, blue in color, bearing Nevada license No. CZZ 701 towing a U-haul trailer and proceeding west on I-80, from which it took the McCarren Blvd., offramp.(R.T.Vol II,p.120). The vehicle was driven by a person, later to be identified as defendant CLIFFORD LEE, to the Sierra Sid's Union Truck Stop where it was serviced and from there to the MGM Hotel where defendant CLIFFORD LEE met with defendants JAMES R. BROWN and HARRY O'BRIEN in the Piano Bar of the Hotel (R.T. Vol II,p.121).

Defendant CLIFFORD LEE then returned to the vehicle and drove back to the Sierra Sid's Union Truck Stop where he again met

with defendants JAMES R. BROWN and HARRY O'BRIEN who were driving a 1977 Chevrolet Blazer, bearing Oregon license LNQ 732(R.T. Vol II,pp. 123-127).

At about 10:30 p.m. on September 14, 1979 the DEA Agents observed defendants CLIFFORD LEE, JAMES R. BROWN and HARRY O'BRIEN remove the U-haul trailer from the Cadillac and hook it up to the Chevrolet Blazer (R.T. Vol I,p. 269). Thereupon all three defendants were arrested for violation of federal narcotics laws. The DEA agents did not have any search warrants at the time of arrest.(R.T. Vol. I, pp. 270-272).

On September 14, 1979 after the arrest of of defendant JAMES R. BROWN, DEA agent LEWIS F. THOMAS seized from his shirt pocket a one-ounce packet of cocaine from the pocket of the shirt that defendant JAMES R. BROWN was wearing at the time (R.T. VOL. I, p. 272).

Subsequently, on September 14, 1979 after the arrests of defendants CLIFFORD LEE, JAMES R. BROWN and HARRY O'BRIEN, and after the search of the three defendants, the DEA agents seized the Chevrolet Blazer. (R.T. Vol. I, p.272).

On September 15, 1979 DEA agent LEWIS F. THOMAS, executed Federal Search Warrant #79-00130 on the above-described U-haul trailer from which was seized five Bally slot machines (R.T. Vol. I,pp. 297-305).

Also, on September 15, 1979 DEA agent LEWIS F. THOMAS executed Federal Search Warrant #79-00128 on a combination locked gray briefcase, found in back of the drivers seat of the Chevrolet Blazer. The briefcase was presumed to have narcotice in it, but was found to have $39,500 in United States Currency, and a loaded pistol in a zippered pistol case (R.T. Vol I,pp. 298-302).

Also, on September 15, 1979 DEA agent LEWIS F. THOMAS executed Federal Search Warrant #79-00131 on the above-described Cadillac, which was only driven by defendant CLIFFORD LEE. From the locked truck of the Cadillac, the DEA agents seized approximately 5,371.9 grams of sulfate amphetamines contained in 12 packages found in a zippered up brown traveling bag(R.T. Vol. I,pp. 305-311).

Reasons for Granting Writ of Certiorari

A. The DEA Agents Did Not Have Probable Cause to Arrest Defendant HARRY O'BRIEN.

On or about September 14, 1979 the DEA Agents arrested, without warrants, defendants HARRY O'BRIEN, JAMES R. BROWN and CLIFFORD LEE at Sierra Sid's 76 Auto Truck Plaza in Sparks, Nevads.(See Master Docket Document 9 Affidavit of Lewis F. Thomas).In said affidavit of Lewis F. Thomas, he states, on page 4, lines 19-32 and page 5, lines

1-2 that: "Your affiant at the conclusion of the meeting followed Lee to his Cadillac automobile which was towing a U-Haul trailer. Lee thereupon drove his automobile to Sierra Sid's at Sparks, Nevada where Lee again met O'Brien and Brown. Your affiant discerned at Sierra Sid's that the license plate number of said Chevrolet Blazer vehicle was:Oregon LNQ732. Then the two vehicles, that is, the Cadillac and the Blazer, parked side by side. Lee opened the trunk of the Cadillac and unhooked the U-Haul trailer therefrom and attached it to the Blazer with the assistance of O'Brien and Brown. O'Brien, Brown and Lee were at and about the trunk area of the Cadillac for a period of about three or four minutes during which time the trunk remained open. After attaching the U-Haul and trailer to the Blazer vehicle, it appeared that O'BRIEN,Brown and Lee were going to depart Sierra Sid's in their respective vehicles and thereupon your

affiant and other agents arrested Lee, O'Brien (emphasis added). It is important to note that the affiant Lewis F. Thomas did not state in his affidavit what the defendants were arrested for. There is nothing illegal about transfering a U-Haul trailer from one vehicle to another at a lighted truck stop in Sparks, Nevada. Probable cause exists where the facts and circumstances within the arresting officers knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. Draper v. United States, 358 U.S. 307,313. Therefore an objective test would have showed no probable cause existed for the arrest. In the case of United States v. Chadwick, 393 F. Supp. 763, the court held that a non-criminal explanation of Chadwick's conduct is at least as likely as one

indicating his knowing involvement in the criminal enterprise. The court further stated that the government agents are required to meet a standard that can be understood by the average reasonably prudent person. The affiant LEWIS F. THOMAS did not meet this standard. Further, it is important to note here that on page 1, paragraph 2(a) of his affidavit, Agent LEWIS F. THOMAS states "there is probable cause to believe that HARRY O'BRIEN, JAMES BROWN and CLIFFORD LEE on September 14, 1979 conspired to possess with the intent to distribute a controlled substance, that is, cocaine, in violation of Title 21, U.S.Code, Sections 841(a)(1) and 846" (emphasis added). Prior to the arrest of the defendants, there was no mention of cocaine.

Next, on page 3 of the affidavit, Agent LEWIS F. THOMAS makes a statement

about an unreliable confidential informant. TheUnited States Supreme Court establishes its two-prong test concerning informants in Augilar v. Texas, 378 U. 108. The court stated: "Although an affidavit may be based on hearsay information and need not reflect the direct personal observation of the affiant,. . . the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed,. . . was 'credible' or his information 'reliable'. Otherwise, 'the inferences from the facts which lead to the complaint' will be drawn not 'by a neutral and detached magistrate,' as the Constitution requires, but instead, by a police officer 'engaged in the often competitive enterprise of

ferreting out crime,'. . .or, as in this case, by an unidentified informant".

The "reliability" spur of the two prong test has not been met. When the DEA Agents attempted to establish the credibility of the informant as a part of their task of establishing that probable cause existed for their arrest and/or search, they tried to do so by referring to past performances of the informant. But, in McCrary v. Illinois, 386 U.S. 300, the court stated that a showing is made when the informant has provided information on past occasions which led to arrests and convictions. The affidavit of LEWIS F. THOMAS does not mention any arrests and convictions from information provided by the informant. The affidavit of LEWIS F. THOMAS tries to establish reliability of informant by stating that the informant made a declaration against his penal interest. This allegation does

not even meet the reliability spur as espoused in United States v. Harris, 403 U.S. 573, 91 S. Ct.2075. The confidential informant was already serving time for conviction of burglary of slot machines. So any information he gave on alleged stolen slot machines would not be against his penal interest.

The "basis of knowledge" spur of the two prong test has not been satisfied. As Justice White stated in Spinelli v. United States, 393U.S. 410, 89S.Ct. 584: "If the affidavit rests on hearsay - an informant's report - what is necessary under Aguilar is one of two things; the informant must declare either(1) that he has himself seen or perceived the fact or facts asserted, or (2) that his information is hearsay, but there is good reason for believing it - perhaps one of the usual grounds for crediting hearsay information." Agent THOMAS states:"Confidential informant stated that just prior to being arrested

on April 19, 1979, he, the confidential informant, gave 5 slot machines to NORMAN MILLS of Las Vegas. Mills told the confidential informant the slot machines would be taken to Oregon and be exchanged for narcotics" (emphasis added). There is no mention of cocaine. The DEA Agents did not have probable cause to believe there was a controlled substance violation involving cocaine at the time of the arrest. The Court, in Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, stated that: "The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances and in making that assessment it is imperative that the facts be judged against an

objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man or reasonable caution in the belief' that the action taken was appropriate?" The complaint (Master Docket Document 9) in paragraph 1(a) alleges the controlled substance was amphetamines. The only way the DEA Agents could have alleged cocaine was through the fruits of an illegal arrest and search. In his affidavit, on page 5, DEA Agent LEWIS F. THOMAS states that after the arrest, he searched JAMES BROWN on September 14, 1979 and found about 1 ounce of cocaine. Agent THOMAS goes on to state that he inventoried the Blazer and found one grey briefcase. All these items should have been suppressed at the suppression hearing on January 7, 1980 as the fruits of an illegal arrest and search.

Mapp v. Ohio, 367 U.S. 643, 81. Ct. 1684; Wong Sun v. U.S., 371 U.S. 471, 83 S. Ct. 407. At the Suppression Hearing the DEA Agent GARY CARTER stated(R.T. on page 22, lines 10-11) that "the slot machines would be exchanged for narcotics." There is no mention of cocaine by Agent GARY CARTER. Agent GARY CARTER goes on to state(R.T. on page 25, lines 10-16) that:

> "Later on the same day, approximately 4:30 p.m. there was a message from Nye County Sheriff's office that the said Cadillac that was telephoned to them that day passed through Tonopah, Nevada, and was using a U-Haul trailer, northbound, with one male subject in the vehicle. We concluded that the trailer contained the slot machines . . ." (emphasis added).

This conclusion did not have a factual basis. Later, Agent GARY CARTER stated on page 27, lines 11-12, that we strongly believed that the slot machines were in the U-Haul at the time . . ." A belief is not a factual basis upon which to establish probable cause.

Defense counsel for HARRY O'BRIEN at the suppression hearing questioned Agent GARY CARTER about the circumstances leading up to the arrest as follows:

"Q. You didn't know where the vehicle Cadillac was going, isn't that correct?

A. That's correct.

Q. You didn't know the vehicle was going to the MGM, isn't that correct?

A. Had no idea.

Q. At first you didn't know who was in the vehicle did you, isn't that correct, when you had first left Las Vegas?

A. That's true.

Q. You didn't know the vehicle was going to Sierra Sid's did you?

A. No, I didn't.

Q. You didn't know what other vehicle would be at Sierra Sid's, isn't that correct?

A. That's correct, I had no idea.

Q. You had nothing at all, nobody knew anything at all about a Blazer Vehicle?

A. Not at all.

Q. You had no idea of any specific persons up in Reno, if Reno it was or Winnemucca, or wherever you were talking about, you had no idea of how many people were going to be on the other end, isn't that correct?

A. That's a correct statement.

Q. You had no idea of any narcotic contraband of any sort when that vehicle left Las Vegas, no evidence, no hard evidence, no views by anyone of any contraband or anything like that, isn't that correct? You had no description of the package the narcotics would be in?

A. No, Sir.

Q. Anyone describe whether or not they had seen slot machines in the U-Haul trailer?

A. No Sir." (R.T. Suppression Hearing, pp. 67, 68, lines 2-25, 1-9).

It is quite apparent that Agent GARY CARTER was telling the truth and did not have probable cause to arrest defendant HARRY O'BRIEN.

At trial, Agent LEWIS F. THOMAS stated that he arrested the defendants but did not state for what narcotic violation and what illegal substance was involved.(R.T. Vol. I, pp. 158-159, lines 21-25, 1-5).

Later, in the trial, Agent LEWIS F. THOMAS stated that he advised all three defendants that they were under arrest for a violation of Federal narcotic laws. (R.T. Vol. I, pp. 271-272, lines 25, 1-2). Agent LEWIS F. THOMAS did not tell the jury what narcotics were involved at the time of the arrest and what narcotic laws were violated at the time of arrest. Agent DENNIS CAMERON did not advise the jury what narcotics were involved at the time of arrest and what narcotic laws were violated

(R.T. Vol. I, pp. 329-330, lines 23-25, 1-8). Agent LEWIS F. THOMAS did not see an alleged exchange of narcotics for cash and/or slot machines. (R.T. Vol.III, p. 269, lines 3-16). Agent BRUCE GATES did not see an alleged exchange of narcotics for cash and/or slot machines. (R.T. Vol. II, p. 262, lines 4-20). Agent GARY CARTER did not see an alleged exchange of narcotics for cash and/or slot machines. (R.T. Vol. II, p. 179, lines 3-9). Agent DAVID MATZ did not see an alleged exchange of narcotics for cash and/or slot machines. (R.T. Vol. II, p. 165-166, lines 1-25, 1-5). Agent DENNIS CAMERON did not see an alleged exchange of narcotics for cash and/or slot machines. (R.T. Vol. II, pp. 109-112). None of the Agents saw an alleged exchange of narcotics for cash and/or slot machines. Therefore, the Agents acted without probable cause in arresting defendant HARRY O'BRIEN.

Next, Agent LEWIS F. THOMAS gives the reason to the prosecutor for seizing the Blazer as follows:

> "Q. Why did you seize the Blazer and not the Cadillac?
> A. I seized the Blazer because in my opinion it was used to transport cocaine." (R.T. Vol.1,pp 161,162, lines 25, 1-2).

Agent LEWIS F. THOMAS then makes an important revelation to the Prosecutor:

> "Q. You said you believed the Blazer was used to transport cocaine; is that what you mean?
> A. Yes.
> Q. You don't think the Blazer was used to transport any amphetamines?
> A. Yes.
> Mr. Conner: Your Honor, could we have the question and answer read back for that last one? The record was read." (R.T. Vol.1,p. 162, lines 12-20).

Agent LEWIS F. THOMAS clearly admits here that he did not believe at the time of arrest that the Blazer was used to transport amphetamines. Therefore, there would not be probable cause for Agent LEWIS F. THOMAS to arrest Defendant HARRY O' BRIEN. Agent LEWIS F. THOMAS had no basis to conclude that the defendants had a controlled substance

at the time of arrest. Good faith on the part of the arresting officers is not enough to establish probable cause. Probable cause exists if the facts and circumstances known to the officer warrants a prudent man in believing that the offense had been committed. Henry v. United States, 361 U.S. 98. The fact that afterwards contraband was discovered is not enough. An arrest is not justified by what the subsequent search discloses. Johnson v. United States, 333 U.S. 11.

If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be secure in their persons, houses, papers, and effects, only in the discretion of the police. Beck v. State of Ohio, 379 U.S. 89, 98.

Defendant HARRY O'BRIEN respectfully submits that his Fourth Amendment rights were violated by the aforementioned acts of overexcited DEA Agents.

B. The Search Warrants Were Issued Without Probable Cause and Affidavit Signed by a DEA Agent was Defective.

At the Motion to Suppress Hearing, it was clearly shown that the affidavit of DEA Agent LEWIS F. THOMAS contained many factual inaccuracies which attacked the integrity of the officer and the defendant HARRY O'BRIEN believes that factual inaccuracies destroyed the probable cause for a search. Rugendorf v. United States 376 U.S. 528.

The first factual inaccuracy occurs where on line 2, page 2, of the affidavit in support of the search warrant DEA Agent THOMAS stated that confidential informant gave one of the slot machines to DONALD WOOD.

Agent GARY CARTER testified that this was incorrect. The wording should be that DONALD WOOD possessed one stolen slot machine. He didn't know who gave it to MR. WOOD.(R.T. p. 56, lines4-15).

Further, Agent GARY CARTER stated that he was the agent conveying the information to the affiant Agent LEWIS F. THOMAS(R.T. p. 56, lines 16-22).

Agent GARY CARTER stated that no agent from Las Vegas told any Reno, Nevada DEA Agent who was driving the Cadillac (R.T. p. 57, lines 6-13).

In the affidavit of Agent LEWIS F. THOMAS, there is a statement on page 1, lines 11-17 that "there is probable cause to believe that HARRY O'BRIEN, JAMES BROWN and CLIFFORD LEE on September 14, 1979 conspired to possess with the intent to distribute a controlled substance, that is, cocaine, in violation of Title 21, United States Code, Section 841(a)(1) and 846 (emphasis added)". The reference to

cocaine can only be to the cocaine that was taken from the shirt pocket and wallet of defendant BROWN after he had been arrested. There is no mention of amphetamines in Paragraph 2. If the DEA agents relief upon the statement of informant KENNY ANDERSON, there should have been a reference to amphetamines. But mor importantly, since there is no mention of amphetamines, then the DEA agents could not have arrested the defendants for a Federal Narcotics Violation relating to amphetamines. Therefore, there was no probable cause to arrest the defendants. All the DEA agents saw was a U-Haul trailer being transferred at a truck stop from a Cadillac to a Blazer. There is nothing unusual about such a transfer.

Under paragraph 2(b) lines 18-25, DEA Agent LEWIS F. THOMAS states "there is probable cause to believe that HARRY O'BRIEN, JAMES BROWN and CLIFFORD LEE conspired to

transport gambling devices, namely slot machines in interstate commerce from Las Vegas, Nevada, to the State of Oregon, in violation of Title 15, United States Code Section 1172 and 1176, and Title 18, United States Code, Section 371". On page 3, lines 21-31, of the affidavit of Agent LEWIS F. THOMAS, he states that agents from Las Vegas office have cause to believe that there are stolen slot machines in the trailer. But, the affidavit does not explain what the cause is. What was the factual basis for this unfounded conclusion? If the DEA agents had cause, why didn't they obtain a search warrant ahead of time? The answer is that they did not know what was in the U-Haul trailer until after they opened it. In fact, Agent THOMAS stated that "We opened the U-Haul trailer on September 15 and went back to the office to obtain a search warrant"(R.T. Vol I, p. 304, lines 10-18).

Next, the affidavit of Agent LEWIS F. THOMAS on page 4, lines 19-32 and page 5, lines 1-2, describes very carefully how the defendants, at a truck stop, transferred a U-Haul trailer from a Cadillac to a Blazer. There was noth ing unusual about this transfer, except that Agent LEWIS F. THOMAS arrested the defendants without a warrant. It is imperative here to realize in this affidavit that there is no mention of the charges the defendants were arrested for. Next, Agent LEWIS F. THOMAS states that he searched the person of JAMES BROWN after the arrest, and found one ounce of cocaine (p. 5 lines 3-5). Next, Agent LEWIS F. THOMAS states that he removed the briefcase from the Blazer and took it to Reno, Nevada DEA offices. Agent LEWIS F. THOMAS further states that he had a highly trained narcotics detector dog smell the briefcase for controlled substance. He further states that the dog can detect

cocaine. Sure enough, the dog scratched at the briefcase. Agent LEWIS F. THOMAS concluded the briefcase had controlled substances in it and obtained a search warrant (pp. 5-6 lines 3-32 and 1-29). It is obvious to anyone that Agent LEWIS F. THOMAS had tainted the evidence in the case and it is clearly stated in his affidavit. He took the cocaine from defendant BROWN. Then, he grabbed the briefcase with the scent of cocaine on his hands. Any highly trained dog would sniff out the cocaine. The magistrate should not have issued a search warrant. Further the briefcase was opened and, to no one's surprise, there was no illegal drugs. There was only money and a loaded pistol in a zippered case.

Next, the affidavit of Agent LEWIS F. THOMAS is further fatally defective on page 3, lines 10-11. He states that " the confidential informant gave 5 slot machines to NORMAN MILLS of Las Vegas." At the

Suppression Hearing Agent GARY CARTER stated that the affidavit should read "The confidential informant gave 5 slot machines to CLIFFORD LEE of Las Vegas." (R.T.p. 76, lines 18-22). Further, in his affidavit on page 3, lines 16-19, he stated that "the confidential informant also told Special Agents LOVATO and CARTER that the amphetamines he was arrested with on April 19, 1979, were given to him by NORMAN MILLS." At the Suppression Hearing, Agent GARY CARTER stated that the affidavit should read "The confidential informant also told Special Agents LOVATO and CARTER that the amphetamines he was arrested with on April 19, 1979, were given to him by CLIFFORD LEE ." (R.T. pp. 76 and 77, lines 18-25 and 1-3). Further, in his affidavit on page 3, lines 19-21, he stated that NORMAN MILLS in the past has made several trips to Reno, Nevada, for the purpose of picking up narcotics, in particular, amphetamines." At the Suppression Hearing,

Agent GARY CARTER stated that the affidavit should read "confidential informant stated that NORMAN MILLS and CLIFFORD LEE in the past has made several trips to Reno, Nevada for the purpose of picking up narcotics, in particular, amphetamines," (R.T. p. 77, lines 5-14). Now, it appears quite obvious that the affidavit was defective. Agent GARY CARTER disputes what Agent LEWIS F. THOMAS attested to. Minimally, as attested to by Agent LEWIS F. THOMAS, the information on page 3, lines 9-21 ahould have been stricken by the Magistrate because it did not relate to any of the defendants. If these items were stricken, then there would be no probable cause to issue a search warrant.

Therefore, the affidavit of DEA Agent LEWIS F. THOMAS does not implicate defendant HARRY O'BRIEN. The only person implicated is a non-defendant NORMAN MILLS.

The Ninth Circuit in United States v Hole, 564 F2d 298, has held that innocent misstatements, even if material, if made in goof faith and neither intentionally or recklessly made, will not vitiate an otherwise sufficient affidavit submitted by a government agent. Defendant HARRY O'BRIEN believes that this case is not applicable because DEA Agent LEWIS F. THOMAS made too many material errors. Surely, since so many errors were made by DEA Agent LEWIS F. THOMAS, the actions of DEA Agent THOMAS was reckless and maybe intentional. The record is silent on the intentional aspect. Trial counsel for defendant HARRY O'BRIEN did not inquire into this area at the Motion to Suppress Hearing. This error was another instance of ineffective counsel at the Motion to Suppress Hearing. See Argument 4 on this Petition for a further analysis of this point.

Further, the tainting of the evidence (gray briefcase) by DEA Agent LEWIS F. THOMAS

is atrocious. The affidavit clearly shows that tainting. Yet, the Magistrate allowed a search of the gray briefcase. The FifthCircuit, in United States v. Astroff, 556 F2d 1369, has held that a negligent mistatement in a search warrant affidavit renders that affidavit invalid if it would not establish probable cause without the mistatement. Under this test, the affidavit of DEA Agent LEWIS F. THOMAS would not establish probable cause if each of the erroneous statements were excised from the affidavit. A decision by this Court is necessary to clarify this important area.

Finally, the statements in the affidavit of Agent LEWIS F. THOMAS attributed to KENNY ANDERSON, the confidential informant, were not corroborated in the affidavit. This does not meet the two-prong test of Aguilar and Spinelli, supra.

First, the Affidavit for Search Warrant

should set forth the underlying circumstances necessary to enable the magistrate independently to judge the validity of the informants' conclusion that the narcotics were where he said they were. Second, the affiant-officers must attempt to support their claim that their informant was "credible" or his information "reliable". Spinelli v. U.S. 410, 413, Aguilar v. Texas, 378 U.S. 108.

Although the reviewing court will pay substantial deference to judicial determinations of probable cause, the court must still insist that the magistrate perform his "neutral and detached" function and not serve merely as a rubber stamp for the police. Aguilar v. Texas, 378 U.S. 108,111.

It is respectfully submitted that the magistrate rubber stamped the actions of the overzealous DEA Agents and did not adhere to the requirements of Federal Rules of Criminal Procedure, Rule 41(c). There-

fore, defendant HARRY O'BRIEN's Fourth Amendment United States Constitution, search and seizure rights were violated.

C. The Conviction of Defendant HARRY O'BRIEN at His Joint Trial Should Be Set Aside Due To a Codefendant's Confession Inculpating the Defendant HARRY O'BRIEN

The defendants HARRY O'BRIEN, JAMES ROBERT BROWN and CLIFFORD LEE were tried in a joint jury trial beginning January 24, 1980 in the United States District Court, District of Nevada (See Master Docket Document71). On January 22, 1980 defendant HARRY O'BRIEN filed a motion for severance of his trial or in the alternative, to suppress certain statements made by the Defendant LEE to law enforcement officers. (See Master Docket Document 66). On January 23, 1980 the government filed an opposition paper opposing the motion of HARRY O'BRIEN for severance. (See Master Docket Document 68). On January 23, 1980, the trial court denied HARRY O'BRIEN

motion for severance(See Master Docket Document 69).

Under Rule 14 of the Federal Rules of Criminal Procedure, the court may enter an Order granting a severance of the Defendants for trial whenever it appears that a defendant will be prejudiced by a joint trial. This rule usually occurs in cases where the Government intends to use the statement made by one of the defendants which implicates a codefendant. Further, when the defendant making the statement does not take the witness stand, the co-defendant is denied his Sixth Amendment Right of Confrontation, United States Constitution. Limiting instructions on use of co-defendant's confession implicating defendant are not adequate substitute at joint trial for defendant's constitutional right of cross-examination. Bruton v. U.S., (1968) 391 U S. 123. The Fifth Circuit in United States v.

Stewart, (1978) 579 F. 2d 356, at p. 359, has held that a statement ("some of his buddies") made by one defendant, not inculpatory of a co-defendant on its face, is admissible in a joint trial even though other evidence in the case indicates that a co-defendant not mentioned in the statement was involved in the activities described. The Fifth Circuit goes on to state that the judge gave a cautionary statement that the statement could not be considered as evidence against another defendant.

The statements made by the Defendant LEE were made subsequent to the termination of any alleged conspiracy which might have been proved and therefore would not be admissible as a co-conspirator's statement. United States v. Eagles (9th Cir) 571 F.2d 1069; Federal Rules of Evidence Rule 801(d)(2)(E).

The trial court in its Order (See Master

Docket Document 69) stated that the statement of defendant LEE on its face was not incriminatory of the co-defendants relied upon per Bruton v. U.S., supra; U.S. v. Stewart, supra; and U.S. v. Santos, (9th Cir.) 430 F. 2d 1295. The trial court then stated that if such statements are admitted, the court, upon motion by any of the defendants will instruct the jury that such statements are received only as to the defendant LEE. Defendant LEE did not testify at the trial.

The Defendant O'BRIEN contends that the Bruton errors occurred as follows:

The prosecutor asked the informant KENNY ANDERSON the following:

> "Q. Did he (CLIFFORD LEE) ever indicate to you where the amphetamines that he had you sell for him came from?
> A. Yes.
> MR. CONNOR: Object.
> THE COURT: Can you state your ground very briefly?
> MR. CONNOR: Bruton. I have no idea where Coon is going, but Bruton v. United

States.

THE COURT: Let's go ahead. Let's go ahead step by step.

Q. Now, when LEE told you where the amphetamines came from, please state the place.

A. In Oregon

Q. Mr. LEE, when the statement was made by Defendant LEE to you that the amphetamines came from Oregon, as best as you can you give us the time and place that that was said?

A. Yes. It was June of 1978 at my house.

Q. In Las Vegas?

A. Yes.

Q. Did he say whether or not the amphetamines were manufactured in Oregon?

A. Yes.

Q. He said that they were?

A. Yes.(R.T. Vol. 1, pp. 145,146,147).

Q. You supplied all Las Vegas with amphetamines?

A. I didn't supply it, it came from Oregon.

Q. And it came from-all the amphetamines that was hitting the streets came from Oregon?

A. I can't say every ounce of it, but 90 percent of it".(R.T. Vol. 1, pp. 145-149).

It appears quite obvious that the statements of Defendant LEE that the amphetamines came from Oregon was highly prejudicial against defendants HARRY O'BRIEN and JAMES R. BROWN because they were the only

defendants from Oregon. Further, the prosecutor in his opening argument identifies the two Oregonians as BROWN and O'BRIEN.(R.T. Vol. 1, p.4, lines 24-25). Further, the prosecutor tried and did use the telephone tolls of defendant O'BRIEN and BROWN which were from Oregon (Plaintiffs Exhibits 1 and 2). The trial court should not have allowed this testimony in. The record shows that the trial court did not give an admonition to the jury at this time. In fact, the trial court did not make any admonition to the jury until the next day. (Friday, January 25, 1980).(R.T. Vol. 1, pp. 199-200). The jury was with the tainted evidence overnight. Not only that, but the admonition of the trial court was not clear. The court stated:

> "There is one thing that I want to mention to you ladies on the jury. Yesterday in testifying, Mr. Anderson, in answer to a question, made some sort of a statement to the effect that they came from Oregon. This had to do with-this was something that was said

> either in the summer of 1978 or February 1979, and it was reporting something that Mr. LEE had said. Mr. Anderson testified here that Mr. LEE had said about amphetamines, they came from Oregon. Now, in that regard to that I admonish you that you may not consider that in regard to the Defendants O'BRIEN and BROWN. You may only consider that in deliberating on this case in regard to the Defendant LEE. Now, that's a littlebit hard for you to sort out, but I'm just telling you that that mention that they came from Oregon, those amphetamines can only be used with regard to Mr. LEE and cannot be used with regard to Mr. O'BRIEN or Mr. BROWN."(R.T. Vol 1. p.200).

Defendant O'BRIEN submits that this admonition was not adequate. The trial court only addressed itself to the incriminating statement that the amphetamines came from Oregon. The trial court did not admonish the jury that the incriminating statement that the amphetamines were manufactured in Oregon could not be used against the defendant O'BRIEN. Therefore, the jury had this highly prejudicial statement within its grasp.

The trial judge then makes a serious

error by creating a Bruton problem. The trial court lumps the defendants O'BRIEN and BROWN together as the Oregon Defendants. The court states in front of the jury,(R.T. Vol. 1, p.199): "I believe I should address myself at this time to the Oregon Defendants." Thus, the court has placed the stigma on defendants O'BRIEN and BROWN that they are the Oregon connection. Defendant O'BRIEN cannot find a case where the judge created the Bruton problem and believes that this Court should reslove this constitutional problem.

The Bruton problem came up again in regards to the Oregon defendants later in the trial.

The prosecutor on cross-examination of Agent LEWIS F. THOMAS asked the following questions:

"Q. Now, the first time that you went up there, what was your dominant purpose for going there?
A. On my first trip to Oregon we

> want a background investigation on Mr. Brown and Mr. O'Brien. Additionally, we wanted to see if we could find any leads that would help us in locating a clandestine amphetamine laboratory.
> Q. What information concerning a clandestine amphetamine laboratory were you operating under, what information did you have that you were following out?
> THE COURT: I would like you to limit this testimony to matters pertaining to Mr. O'Brien only.
> MR. ATCHESON: ...There is a hearsay objection that I would interpose.
> Q. All right, now, what information with respect to Mr. O'Brien did you have when you went up to look at the the laboratory."(R.T. Vol 3,pp.13-14).

The prosecutor in the last question is alleging in his question to Agent LEWIS F. THOMAS that the laboratory was located in Oregon and possibly on the premises of Defendant O'BRIEN. The Bruton problem is clearly evident here since the prosecutor, in his questioning, has told the jury that the manufacturing of amphetamines was occuring in Oregon. And the judge has labeled the defendants O'BRIEN and LEE as the Oregon

defendants. Therefore, through the judge's error, Oregon and O'BRIEN and BROWN have become interchangeable.

D. The Trial Counsel for Defendant HARRY O'BRIEN was Ineffective at the Motion to Suppress Hearing and Trial

The trial counsel for defendant HARRY O'BRIEN was ineffective and denied defendant's Sixth Amendment Right to Counsel of United States Constitution.

A suppression hearing was held on January 7, 1980. Attorney LAWRENCE J. SEMENZA on behalf of defendants HARRY O'BRIEN, CLIFFORD DOYLE LEE and JAMES ROBERT BROWN moved the trial court for an order compelling the Drug Enforcement Administration to provide informant KENNETH ANDERSON as a witness for the Suppression Hearing.

In his affidavit in support of the Motion for Production of Witness, attorney LAWRENCE J. SEMENZA states on lines 15-26, "KENNETH

ANDERSON was an informant who provided information to the Drug Enforcement Administration which later was used as grounds for the arrest of the Defendant. His testimony is important to establish whether the informant himself and the information given meets the requirements in Aguilar v. Texas, 378 U.S. 108, and Spinelli v. United States, 393U.S. 410. Some of the information provided in the affidavit in support of the search warrant is untrue and it is necessary in order to adequately represent the defendants at the hearing on the Motion to Suppress to have the testimony of KENNETH ANDERSON (emphasis added)."

But, on January 7, 1980 at the Suppression Hearing, the court stated: "If Mr. Thomas could readily be able to be here on Wednesday, I would anticipate then we'd have Mr. Anderson and Mr. Thomas as witnesses. Do you have something for me on that, Mr. Semenza?" Mr. Semenza stated:"At this time,

your Honor, I would respectfully move the court to withdraw our motion for production of a witness. I don't think we need Mr. Anderson. I don't know whether my co-counsel agrees, but I see no necessity for Mr. Anderson."(R.T.Supp. Hear. p.80,lines 4-8). Mr. Atcheson, Defense counsel for defendant O'BRIEN stated; "I would join in this motion." (R.T. Supp. Hear., p.80, line9).

The hearing was terminated without any testimony from informant KENNY ANDERSON. Defendant O'BRIEN respectfully submits that there is no valid legal reason why his counsel failed to examine the informant KENNY ANDERSON at the Suppression Hearing. As can be seen from the affidavit of DEA Agent THOMAS the informant was the only person with allegedly first hand knowledge of the stolen slot machines and the alleged future exchange in Oregon of slot machines for narcotics. The informant was the only person to allegedly

tie Norman Mills and/or defendant Clifford Lee to amphetamine narcotic transactions in Reno, Nevada. The alleged probable cause of the DEA agents to arrest defendants HARRY O'BRIEN, CLIFFORD LEE, and JAMES R. BROWN stems from the statements of KENNY ANDERSON, prior to the arrests of defendants. Defense counsel for defendant O'BRIEN at the Suppression Hearing could have extensively examined informant KENNY ANDERSON and tested his knowledge, memory and credibility in front of the judge. There were so many errors in the affidavit of DEA Agent Thomas, the defense could have interrogated KENNY ANDERSON about what he said to the DEA Agents. Further, defense counsel could have determined for the trial judge whether the statements of DEA Agent Thomas, in error, were intentional, negligent or reckless. But, defense counsel for defendant O'BRIEN reduced the Suppression

to a sham when he did not examine the informant whose statements were material to the establishment of probable cause for the arrests and the basis for the affidavit of DEA Agent Thomas in obtaining the Search Warrants. The trial court had little choice but to deny the motion to suppress.

Further, defense counsel for O'BRIEN should have interrogated DEA Agent THOMAS at the Suppression Hearing relating to the inaccuracies in the Affidavit to determine whether his misstatements were intentional, reckless, or otherwise.

The seriousness of this ineffectiveness of counsel showed up later in the trial. Mr. Connor, defense counsel for BROWN stated, "We didn't find out until Friday afternoon that KENNY ANDERSON was going to put us to constructing this man's activity for two months in 1978, and another half a month in

1979..." The court stated:"Just a minute. I don't want to hear anymore of that... you knew about ANDERSON. We had previous hearings. You knew ANDERSON was going to be a witness in this case," Mr. Connor further stated: "We didn't know what his testimony was going to be, about Mr. Brown being in Las Vegas."(R.T.Vol2,p.302, lines 15-25). It appears quite obvious that if defense counsel for O'BRIEN examined informant ANDERSON at the Suppression Hearing, he could have tied informant KENNY ANDERSON to a story and could have discovered what informant ANDERSON would testify to at the trial.

The right to effective assistance of counsel is so vital to a fair trial that courts are compelled to examine every potential infringement of that right with the most exacting scrutiny, Zuck v. Alabama,588 F. 2d

436.

Next, defense counsel for O'BRIEN was ineffective at the trial. He did not make arguments relative to O'BRIEN arguments A,B,C, of this Petition. Defendant O'BRIEN has been forced to argue plain error under Federal Rule of Evidence 103(d) because defense counsel at trial did not timely object to the evidence being admitted.

E. The Prosecution Made Remarks During His Closing Argument Which Prejudiced Defendant HARRY O'BRIEN's Case Before the Jury in Such a Manner That a New Trial Should Be Granted

The Prosecutor made remarks during his closing argument which prejudiced defendants' case before the jury in such a manner that a new trial should be granted. The Prosecutor was so intent on obtaining a conviction of the

defendant that he made many highly inflammatory statements geared to arouse the prejudices of the jury.

In his closing argument, the prosecutor stated "I knew he wasn't going to take off his Penney's suit" (R.T. Vol III,p. 193, lines 9-10). He refers again to the Penney suit (R.T. Vol. III,p. 195, line 21). He again refers to a Penneysuit (R.T. Vol III p. 20, lines 2-3). He further stated "They want to paint a homey, folksy picture for you" (R.T. Vol III p. 193, lines 13-14). These statements can only be viewed as a prosecutor's attempt at prejudicing a jury. The Prosecutor further stated that what a lawyer says "is a lot of hogwash, a lot of bunk. Attorneys don't take an oath. They are representing their respective parties just like that expert witness, for example. The fellow came in here and basically told you that if you have a good lighting system, you can see better than if you don't have it"(R.T. Vol III, p. 193 lines 19-24). The prosecutor

made two erros here. First, he falsely attacks the defense lawyers. A lawyer represents his client and what he states is meaningful. Next, the prosecutor lumped the sworn testimony of an expert witness MR. HUBERT DINTER with the unsworn testimony of an attorney. An attorney may not express his own opinion as to the credibility of witnesses, United States v. Herrera, 531 F. 2d 788. Next, the prosecutor inaccurately stated that MR. HUBERT DINTER was "getting paid $45.00 an hour, spent five hours sitting out there in the hall,$45.00 an hour at that"(R.T. Vol III, p. 194, lines 1-2). Defense counsel for HARRY O'BRIEN tried on several occasions to get the testimony of MR. HUBERT DINTER in ahead of time but the prosecutor objected. Counsel for defendant O'BRIEN asked the court to take the testimony of MR. HUBERT DINTER out of order. The prosecutor voiced his objection(R.T. Vol II pp. 117-118). Counsel for defendant O'BRIEN

asked the court again to take the testimony of MR. DINTER out of order (R.T. Vol II, pp. 217-218). On Both occasions, the court denied the request of O'BRIEN's counsel. I believe it is unfair for the prosecutor to claim in his closing argument that MR. DINTER spent five hours out in the hall at $45.00 an hour. One of the reasons MR. DINTER spent time in the hall is because the prosecutor would not consent to taking the testimony of MR. DINTER out of order. The jury could have discredited the testimony of this lighting expert based upon the actions and then statements of the prosecutor.

Next, the prosecutor lumps DINTER again with defense counsel(R.T. Vol II, p. 194, lines 18-22). Next the prosecutor calls one of the defendants a "weasel". The record is unclear as to which defendant he is referring to.(R.T. Vol III, p. 195 lines 1-2). The court makes an admonition to the jury (R.T. Vol III, p. 195, lines 5-6) I do not

believe this prejudical statement, in conjunction with all the other prejudical statements of the prosecutor, was remedied by the court's admonition to the jury. The prosecutor erroneously comments on the DEA agents. He stated "They did a good job. The Government did a good job. You tell them that when they come in and attack them." (R.T. Vol III, p. 196, lines 20-23). An attorney cannot express his own opinion as to the credibility of witnesses. United States v. Lamersen, 457 F. 2d 371, 372 in which the court held that a prosecutor could not say that "I believe that the prosecution's witnesses are telling the truth". The court states in United States v. Morris, 568 F. 2d 396, 403, that "the prosecutor is reminded, however, that although a United States Attorney has an obligation to conduct the government's case zealously, he also has an obligation to try the case fairly and with due regard for the accused's rights." Next, the

prosecutor told the jury that the defendants "treat you like fools, like you are some kind of idiots"(R.T. Vol III, p. 198 lines 22-23). These remarks are highly imflammatory. Next, the prosecutory vouches for the integrity of the informant KENNY ANDERSON:He states:

> "He may be all the things I said he was, but he came in here and told you the truth about it." (R.T. Vol III, p. 199 lines 6-7).

These statements violate the principle that a prosecutor cannot express his own opinion of the credibility of a witness. United States v. Lamersen, supra.

Next, the prosecutor makes some further derogatory remarks about defendant O'BRIEN. He states,

> "Speaking out of BROWN and O'BRIEN, you go check the Rotary I didn't hear any Rotarians testify. You go check the Boy Scouts." (R.T. Vol III, p. 199 lines 15-17).

Next, the prosecutor makes inflammatory statements to the jury. He states:

"To think otherwise, again, would be to make buffoons and fools and children out of you. You are not going to let that happen ...Don't let that happen. Don't let them confuse you...They're just what they appear to be. That's what they look like, mean, calculating, shrewd, greedy..."(R.T. Vol III, p. 203, lines 6-18).

The prosecutor further makes derogatory remarks to the jury. He states:

"Don't let them pull the wool over your eyes and treat you like the fools that they are trying to pretend that they are." (R.T. Vol III, p. 212, lines 11-13).

This type of statement by the prosecutor led to a reversal on the ground of prosecutorial misconduct in the case of United States v. Drummond (2nd Cir 1973) 481 F 2d 62. The prosecutor again vouces for the credibility of his witness in his rebuttal argument to the jury, He states:

"I think that Mr. Anderson was credible." (R.T. Vol. III, p. 273, line 6).

Finally, the prosecutor throughout his closing argument and rebuttal argument to the jury talked in the first person. He continually refers to "I". For example, he states:

> "As I said before, the Government did a good job in this case. The Agents have not been discredited." (R.T. Vol III, p. 284, lines 8-9)

He, in effect was saying "I believe" to the jury throughout his arguments to the detriment of defendant O'BRIEN. I respectfully submit that the prosecutor has unfairly tried the case without due regard for the rights of defendant HARRY O'BRIEN. Defense counsel for HARRY O'BRIEN did not object to the aforementioned statements of the prosecutor but defendant O'BRIEN believes that these statements were plain error under Federal Rules of Evidence. Rule 103(d). Minimally, the trial judge should have interfered with the prosecutor's closing argument since the prosecutor's statements were unduly inflammatory. United States v. Sturgis, 578 F. 2d 1296. But the trial court did not correct the prosecutor's error.

Conclusion

For the reasons stated above, it is urged that this Court grant Defendant - Petitioner's Petition for Writ of Certiorari and further that the judgment of conviction on Counts I, II and V be reversed, that the evidence aforementioned be suppressed, and the case be remanded for a new trial.

Respectfully submitted,

Paul D. Priamos

PAUL D. PRIAMOS,

Attorney for

Defendant-Petitioner

HARRY O'BRIEN.

Appendix

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
Sep 10, 1981

RICHARD H. DEANE

Clerk U.S. Court of Appeals

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. HARRY O'BRIEN, CLIFFORD DOYLE LEE and JAMES ROBERT BROWN, Defendants-Appellants.	Nos. 80-1170 80-1261, 80-1319 D.C. No. 79-55 MEMORANDUM

Appeal from the United States District Court for the District of Nevada
Edward C. Reed, Jr. District Judge,
Presiding Argued and Submited July 15, 1981

Before: NELSON and NORRIS, Circuit Judges, and REAL,* District Judge

Appellants O'Brien, Brown, and Lee were convicted, after trial by jury, of possession of a controlled substance with intent to distribute, in violation of 21 U.S.C. §841(a)(1) and conspiracy to possess and distribute a controlled substance, in violation of 21U.S.C. § 846. O'Brien and Brown were convicted, in addition, of interestate travel in aid of

*The Honorable Manuel L. Real, United States District Judge for the Central District of Ca, sitting by designation.

racketeering activity (distribution of a controlled substance), in violation of 18 U.S.C. §1952(a)(3). On appeal, the appellants allege a long list of errors by the trial court. We find no merit in any of the appellants' contentions and, accordingly, we affirm the convictions.

Based on our independent review of the record, we uphold the trial court's conclusion that the officers had probable cause to make warrantless arrests of the appellants. Our review also convinces us that the affifavits in support of the search warrants are sufficient to demonstrate probable cause. See United States v. Fried, 576 F.2d 787, 790-91 (9th Cir. 1978). The seizure and searches of the Blazer were clearly lawful under United States v. Johnson, 572 F.2d 229 (9th Cir.), cert. denied, 437 U.S. 907 (1978).

The admission of certain testimony at trial did not violate, under Bruton v. United States, 391 U.S. 123 (1968),

any appellant's right to confrontation. There is no violation of Bruton where, as here, the testimony in question is not "powerfully incriminating." See United States v. Buckner, 610 F. 2d 570, 574 (9th Cir. 1979).

The admission of Lee's post-arrest statements did not violate his Miranda rights. The trial court properly found a waiver by Lee. See Fare v. Michael C., 442 U.S. 707 (1979).

The appellants remaining claims--prosecutorial misconduct, insufficiency of the evidence, insufficiency of voir dire, ineffectiveness of counsel, factual misstatements by the trial court, and double jeopardy--are similarly unpersuasive. None find any support whatsoever in the record.

AFFIRMED.

CERTIFICATE OF SERVICE BY MAIL

HARRY O'BRIEN	)	
	)	
Petitioner	)	PETITION
	)	FOR
v.	)	WRIT OF
	)	CERTIORARI
UNITED STATES OF AMERICA	)	

The undersigned hereby certifies that he is a member of the bar of the United States Supreme Court and is a person of such age and discretion as to be competent to serve papers.

That on November 6, 1981, he served a copy of the attached Petition For Writ Of Certiorari by Petitioner HARRY O'BRIEN by placing said copy in a post paid envelope addressed to the persons hereinafter named, at the places and addresses stated below, which are the last known addresses and by depositing said envelope and contents in the United States Mail in a regular mail depository.

ADDRESSES:

Clerk
United States District Court For The
District of Nevada
300 Booth Street
Reno, Nevada 89509

Solicitor General
Department of Justice
Washington, D.C. 20530

Clerk
United States Court of Appeals For The
Ninth Circuit
P.O. Box 547
San Francisco, Ca. 94101

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 20, 1981 at Newport Beach, Ca 92660.

Paul Duane Priamos

PAUL DUANE PRIAMOS

Opposition

Supreme Court, U.S.
FILED
MAR 26 1982
ALEXANDER L. STEVAS
CLERK

Nos. 81-1014, 81-1296 and 81-1408

In the Supreme Court of the United States

OCTOBER TERM, 1981

HARRY O'BRIEN, PETITIONER

v.

UNITED STATES OF AMERICA

JAMES ROBERT BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

CLIFFORD DOYLE LEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

CAROLYN L. GAINES
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the agents had probable cause to arrest petitioners.

2. Whether the affidavit supporting the issuance of search warrants established probable cause.

3. Whether petitioner Brown was prejudiced by the district court's voir dire of prospective jurors.

4. Whether petitioner O'Brien was denied his constitutional right to confrontation.

5. Whether petitioner O'Brien was denied effective assistance of counsel.

6. Whether petitioner Lee's oral statement was properly introduced at trial.

7. Whether petitioners O'Brien and Brown were unfairly prejudiced by the prosecutor's closing argument.

TABLE OF CONTENTS

	Page
Opinion below	2
Jurisdiction	2
Statement	2
Argument	6
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Aguilar v. *Texas*, 378 U.S. 108	10
Brinegar v. *United States*, 338 U.S. 160	7
Bruton v. *United States*, 391 U.S. 123	11
Carroll v. *United States*, 267 U.S. 132	7
Edwards v. *Arizona*, 451 U.S. 477	13
Franks v. *Delaware*, 438 U.S. 154	10
Miranda v. *Arizona*, 384 U.S. 436	12
Rosales-Lopez v. *United States*, 451 U.S. 182	11
Spinelli v. *United States*, 393 U.S. 410	10
United States v. *Agostino*, 608 F.2d 1035	9
United States v. *Bosch*, 584 F.2d 1113	12
United States v. *Burreson*, 643 F.2d 1344, cert. denied, No. 80-6760 (Oct. 5, 1981)	11
United States v. *Brown*, 451 F.2d 1231	14
United States v. *Cortez*, 449 U.S. 411	7
United States v. *Deggendorf*, 626 F.2d 47, cert. denied, 449 U.S. 986	10
United States v. *Drummond*, 481 F.2d 62	14
United States v. *Giese*, 597 F.2d 1170, cert. denied, 444 U.S. 979	14
United States v. *Hampton*, 633 F.2d 927	8, 10
United States v. *Harris*, 403 U.S. 573	8
United States v. *Juarez*, 566 F.2d 511	13
United States v. *Lamerson*, 457 F.2d 371	14
United States v. *Medel*, 592 F.2d 1305	13
United States v. *Serrano*, 496 F.2d 81	14

Cases—Continued Page

United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 13
United States v. *Stewart*, 579 F.2d 356, cert. denied, 439 U.S. 936 11
United States v. *Tinkle*, 655 F.2d 617, cert. denied, No. 81-5808 (Jan. 25, 1982) 7, 9
United States v. *Willis*, 621 F.2d 744 14
United States v. *Wolfson*, 322 F. Supp. 798, aff'd, 454 F.2d 60, cert. denied, 406 U.S. 924 13-14

Constitution and statutes:

United States Constitution:

Fourth Amendment 6
Sixth Amendment 11

Travel Act, 18 U.S.C. 1952(a)(3) 2
21 U.S.C. 841(a)(1) 2
21 U.S.C. 846 2
21 U.S.C. 881 5

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1014

HARRY O'BRIEN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 81-1296

JAMES ROBERT BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 81-1408

CLIFFORD DOYLE LEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is unreported.[1]

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1981. Petitions for rehearing by petitioners Brown and Lee were denied on November 12, 1981. The petitions for a writ of certiorari in Nos. 81-1014, 81-1296 and 81-1408 were filed on November 6, 1981, January 8, 1982 and January 25, 1982, respectively. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Nevada, petitioners O'Brien, Brown and Lee were convicted of conspiracy to distribute amphetamines, in violation of 21 U.S.C. 846 (Count 5). In addition, petitioners O'Brien and Brown were convicted of interstate travel with the intent to carry on an unlawful activity, in violation of the Travel Act, 18 U.S.C. 1952(a)(3) (Count 1), and distribution of amphetamines, in violation of 21 U.S.C. 841(a)(1) (Count 2); and petitioner Lee was convicted of possession of amphetamines with intent to distribute, in violation of 21 U.S.C. 841(a)(1) (Count 3). O'Brien was sentenced to consecutive terms of five years' imprisonment on Counts 1 and 2 and three years' imprisonment on Count 5, and to a three-year special parole term on Count 2. Peti-

---

[1] "Pet. App." refers to the appendix to the petition in No. 81-1408.

tioner Brown was sentenced to consecutive terms of five years' imprisonment on Counts 1 and 2 and four years' imprisonment on Count 5, and to a two-year special parole term on Count 2. Petitioner Lee was sentenced to consecutive terms of four years' imprisonment with two years' special parole on Count 3 and three years' imprisonment on Count 5. The court of appeals affirmed (Pet. App. 1a-3a).

1. The government's evidence at trial showed that on September 14, 1979, DEA agents, acting on their surveillance of petitioners and on information furnished by an informant, arrested petitioners in a parking lot in Reno, Nevada. The agents seized eleven pounds of amphetamines from the trunk of the Cadillac Eldorado that petitioner Lee had been driving. The agents also seized $41,000 and a loaded revolver from the Chevrolet Blazer with Oregon plates in which the other petitioners had been traveling. In addition, they seized five slot machines from a trailer that had just been transferred from the Cadillac to the Blazer shortly before the arrest.[2]

2. Prior to trial the district court denied petitioners' motion to suppress evidence obtained at the time of their arrest and in a subsequent search pursuant to a warrant. Evidence at the suppression hearing showed that during late March or early April 1979, Kenneth Anderson, the informant, burglarized the Golden Nugget Casino warehouse in Las Vegas, Nevada and stole ten slot machines. Subsequent to his arrest and conviction in state court for that offense, Anderson was interviewed by DEA agents. In those interviews Anderson detailed his

[2] Approximately $39,000 and the revolver were recovered from a briefcase found in the Oregon vehicle and $2,000 was found sticking out of a shirt in that same vehicle.

role in the burglary and informed the agents that he had distributed the unrecovered slot machines to members of the Hessian Motorcycle Gang in Las Vegas, including five slot machines to petitioner Lee, a member of the gang; that he and other members of the Hessian Motorcycle Gang were involved in selling narcotics; that petitioner Lee and Norman Mills made frequent trips to the Reno area to obtain narcotics; that amphetamines he had in his possession at the time of arrest were given to him by petitioner Lee; and that petitioner Lee had visited him in prison and informed him that the slot machines would be exchanged for narcotics. Further, on September 12, 1979, Anderson contacted DEA agents and told them that five slot machines would be taken to Oregon within a few days to be exchanged for narcotics (I Supp. Tr. 21-22, 26-28, 76-77).[3]

By checking prison records, the DEA agents confirmed that petitioner Lee had visited Anderson in prison. Local police reports on the burglary and arrest of Anderson further corroborated his statements. In addition, DEA intelligence reports indicated that the Hessian Motorcycle Gang was known to deal in narcotics and was the source of supply for amphetamines in the area (I Supp. Tr. 23-24, 26, 28, 43, 71).

On September 14, 1979, DEA agents watching Norman Mills' house noticed that the Cadillac Eldorado usually located there had been away for a long time. The Nye County Sheriff's office was contacted and asked to look for the vehicle. At approximately 4:30 p.m., they notified the DEA that the Cadillac,

---

[3] "Supp. Tr." refers to the transcript of the hearing on the motion to suppress. "Tr." refers to the trial transcript. "J. Tr." refers to the transcript of the jury voir dire.

with a U-Haul trailer attached, had just passed through Tonopah, Nevada, traveling north (I Supp. Tr. 25).

At about 5:00 p.m., DEA Agent Alden, the agent in charge in Las Vegas, telephoned DEA Agent Thomas in Reno to request his assistance. Alden described the car and its location and told Thomas that a reliable informant had said the vehicle was transporting approximately five stolen slot machines from Las Vegas to Ashland, Oregon to be exchanged for drugs (II Supp. Tr. 3-4).

Thomas and two other agents set up a surveillance post near the highway. At approximately 8:30 p.m. they spotted the Cadillac and followed it to a casino, where petitioner Lee met with petitioners O'Brien and Brown. All three left the casino and transferred the trailer from the Cadillac to the Blazer, which had Oregon license plates. Following the transfer, the petitioners were arrested and were searched incident to the arrest. One ounce of cocaine was found on petitioner Brown. At this point, the vehicles were transported to the DEA office and secured. The following day search warrants were obtained to search the Cadillac, the trailer and a briefcase that had been found in the Blazer.[4]

Agent Thomas executed the affidavit in support of the search warrants, which was based in part on information he had received from agents in Las Vegas. The affidavit outlined, *inter alia*, the informant's involvement in the burglary and theft of the slot machines; the informant's involvement with narcotics; the informant's distribution of the slot machines to Donald Woods and Norman Mills;

---

[4] The Blazer had been seized for forfeiture pursuant to 21 U.S.C. 881 (I Tr. 159).

and the informant's advice that his source for amphetamines was Norman Mills, that Mills made frequent trips to the Reno area to obtain narcotics, that Mills told the informant that the slot machines would be taken to Oregon to be exchanged for narcotics, and that the Cadillac belonged to Norman Mills. Further, the affidavit detailed the DEA's surveillance of the petitioners up to the time of their arrest, the search incident to the arrest, including the discovery of the cocaine on petitioner Brown and the reaction of a trained narcotics detector dog to the briefcase that was seized from the Blazer, which led the agent to believe that the briefcase contained a controlled substance.

3. The court of appeals upheld (Pet. App. A-2) the trial court's conclusion that the officers had probable cause to make warrantless arrests of petitioners. Further, the court held that the affidavit in support of the search warrants was sufficient to demonstrate probable cause and that the seizure and search of the Oregon vehicle were lawful. The court also rejected petitioners' remaining contentions.

ARGUMENT

1. Petitioners contend (81-1014 Pet. 10-25; 81-1296 Pet. 9-12; 81-1408 Pet. 14-16) that the DEA agents violated their Fourth Amendment rights by arresting them without probable cause. This fact-bound claim was properly rejected by the court of appeals and does not warrant review by this Court.

It is well established that probable cause for an arrest exists where facts and circumstances known by the arresting officer or of which he has reasonably trustworthy information are sufficient in themselves to warrant a person of reasonable caution to

believe that an offense has been or is being committed. *Brinegar* v. *United States*, 338 U.S. 160, 175-176 (1949); *Carroll* v. *United States*, 267 U.S. 132 (1925). The probabilities involved are not to be weighed in a highly technical manner, but rather to be viewed in terms of the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. *Brinegar* v. *United States*, *supra*, 338 U.S. at 175. In making this determination, law enforcement officers are entitled to assess the facts in light of their specialized knowledge and experience, which may permit them to make deductions that would elude an untrained observer. *United States* v. *Cortez*, 449 U.S. 411, 418 (1981). See also *United States* v. *Tinkle*, 655 F.2d 617, 621 (5th Cir. 1981), cert. denied, No. 81-5808 (Jan. 25, 1982).

Under these principles, the facts and circumstances known to the agents at the time of petitioners' arrests established probable cause. DEA agents had interviewed Anderson in August and September of 1979, while Anderson was serving his sentence for the burglary and theft of ten slot machines. During those interviews Anderson informed the agents that he had distributed the stolen slot machines to members of the Hessian Motorcycle Gang in Las Vegas. He stated that five of the slot machines had been given to petitioner Lee and that Lee had visited him in prison and had informed him that the slot machines were to be exchanged for narcotics.

The agents conducted a check of the prison records, which corroborated Anderson's claim that Lee had visited him at the prison. The Las Vegas Metropolitan Police Department had furnished the DEA agents with reports of the burglary and arrest of Anderson that further corroborated his statements.

DEA intelligence reports, which were checked prior to the arrests in this case, indicated that the Hessian Motorcycle Gang was known to deal in narcotics and that it was the source of supply for amphetamines in the area. In fact, Anderson stated that the amphetamines he had in his possession at the time of his arrest came from petitioner Lee and that petitioner Lee and Mills made frequent trips to the Reno area to obtain illicit drugs. Also, Anderson stated that he was involved in drug dealings with petitioner Lee.[5]

Furthermore, just two days after Anderson had informed the agents that the slot machines would soon be taken to Oregon to be exchanged for drugs, Mills' Cadillac was observed traveling north toward Oregon with an attached U-Haul trailer suitable for transporting the stolen slot machines. When petitioner Lee arrived in Reno he met with petitioners O'Brien and Brown, who were traveling in a vehicle with Oregon license plates, and subsequently the trailer was transferred to the Oregon vehicle. These actions suggested that the contents of the trailer were going to be transported to Oregon.

Anderson's knowledge was based on his own participation in the theft and distribution of the slot machines, many of which had not been recovered at the time of the arrests. Anderson's credibility was established by the corroboration of much of his statement by police observation of petitioners' activities prior to the arrests and through law enforcement

---

[5] Statements made by Anderson with respect to his involvement in drug distribution in the Las Vegas area prior to his imprisonment were against his penal interest. This is an additional factor indicating reliability. See *United States* v. *Harris*, 403 U.S. 573, 583 (1971); *United States* v. *Hampton*, 633 F.2d 927, 929 (10th Cir. 1980).

reports. The collective knowledge of the agents justified a reasonable belief that a crime had probably occurred when the transfer of the trailer had been completed. See *United States* v. *Tinkle, supra*, 655 F.2d at 622; *United States* v. *Agostino*, 608 F.2d 1035, 1037 (5th Cir. 1979).

2. Petitioners also claim (81-1014 Pet. 26-37; 81-1408 Pet. 7-14) that the searches of the Cadillac, trailer and briefcase were unlawful because they were not based on probable cause. They maintain that the affidavit supporting the search warrants was deficient in that it contained inaccuracies, stale information, and did not establish the informant's reliability or knowledge. This claim is without merit.

The information outlined in the affidavit was similar to the information the agents possessed at the time of the arrests. Additionally, the affidavit described the circumstances surrounding the arrests of petitioners, including the discovery of cocaine on petitioner Brown and the detection by a trained dog of a controlled substance in the briefcase.[6] This information clearly established probable cause to believe that narcotics would be found in the briefcase and the Cadillac and that the stolen slot machines would be found in the trailer.

The affidavit recited information that had been supplied by a participant in the theft of the slot machines and in narcotics dealing in the Las Vegas area. DEA actions that had been taken independently to corroborate the informants statements were noted in the affidavit. The surveillance operation and arrests that confirmed the informant's statements also

---

[6] The fact that only $39,000 and a pistol were found inside the briefcase after it was opened in no way undercut the "probable cause" that existed prior to the search.

sufficiently updated the information. See *United States* v. *Deggendorf*, 626 F.2d 47, 51-52 (8th Cir.), cert. denied, 449 U.S. 986 (1980). Accordingly, the affidavit demonstrated the basis of the informant's knowledge and his reliability in compliance with the requirements of *Spinelli* v. *United States*, 393 U.S. 410 (1969), and *Aguilar* v. *Texas*, 378 U.S. 108 (1964).

The fact that Agent Thomas mistakenly attributed certain actions to Norman Mills rather than to petitioner Lee does not render the affidavit fatally defective. These misnomers were neither material nor prejudicial, and, accordingly, were not fatal to the ultimate finding of probable cause. *United States* v. *Hampton*, 633 F.2d 927, 929 (10th Cir. 1980). In order to succeed in an attack upon the facially sufficient warrant application, petitioners were required by *Franks* v. *Delaware*, 438 U.S. 154, 171-172 (1978), to show first, that the misstatements were the product of deliberate falsehood or reckless disregard for the truth, and not the result of negligence or innocent mistake, and second, that after correcting the misstatements, the affidavit failed to establish probable cause. Petitioners have made neither showing.

3. Petitioner Brown next argues (81-1296 Pet. 12-17) that the district court erred in not asking potential jurors if they were related to or knew anyone who had been involved with or used narcotics. Instead the district court asked (J. Tr. 44-45):

> Are there any of the prospective jurors who have a belief or opinion that the offenses charged in this case are unique in any respect, and by unique I mean that they should be pursued with extraordinary vigor or shouldn't constitute an offense, or that they carry penalties which you consider improper?

This question was asked after the indictment had been read to the jury venire. The indictment made detailed allegations with respect to possession and distribution of contraband drugs. Thus, the jurors' only reasonable understanding of this question was that it related to their opinions and biases concerning narcotics. Accordingly, the question was sufficient to identify any impermissible influences or attitudes held by the jurors, and the district court did not abuse its discretion in refusing to ask the exact question requested by petitioner. See *Rosales-Lopez* v. *United States*, 451 U.S. 182 (1981).

4. Petitioner O'Brien's claim (81-1014 Pet. 37-46) that his Sixth Amendment right of confrontation was violated by the admission of testimony concerning statements made by petitioner Lee is equally lacking in merit. He cites Anderson's testimony that petitioner Lee had told Anderson in June 1978 that the amphetamines were manufactured in Oregon. He argues that this testimony violated his right to confrontation under *Bruton* v. *United States*, 391 U.S. 123 (1968), because he was unable to confront petitioner Lee, and therefore the district court erred in denying his motion for severance. However, the statement attributed to petitioner Lee did not directly implicate petitioner O'Brien. Accordingly, the statement, which was not inculpatory of petitioner O'Brien on its face, was properly admitted at the joint trial. See *United States* v. *Burreson*, 643 F.2d 1344, 1349 (9th Cir.), cert. denied, No. 80-6760 (Oct. 5, 1981); *United States* v. *Stewart*, 579 F.2d 356 (5th Cir.), cert. denied, 439 U.S. 936 (1978). Moreover, the district court gave a cautionary instruction that the testimony could not be considered as evidence against petitioner O'Brien (V Tr. 200).

5. There is no merit to petitioner O'Brien's claim (81-1014 Pet. 46-52) that he received ineffective assistance of counsel at his suppression hearing because counsel failed to press for the appearance of the informant, Anderson, as a witness. He argues that had Anderson been called as a witness at the suppression hearing his trial testimony could have been discovered and Anderson would have been tied to one version of the facts. Suppression hearings are not, however, intended as vehicles for pretrial discovery. In any event, the decision not to call Anderson as a witness was reached after DEA Agent Carter had been thoroughly examined concerning his contact and interviews with Anderson. The crucial issue at the hearing was the knowledge possessed by the agents at the time of arrest and the agents' information that was presented to the magistrate in support of the warrants—not the information in the possession of the informant. The principal agents involved were examined at the suppression hearing, and the discrepancies concerning the names in the warrant affidavit were fully explored. Accordingly, petitioner can show no prejudice caused by his attorney's decision not to press for Anderson's testimony at the hearing. Trial counsel was not required to waste the court's time by pursuing futile or repetitious tactics solely to protect himself from a charge of ineffective assistance. See *United States* v. *Bosch*, 584 F.2d 1113, 1121 (1st Cir. 1978).

6. There is no merit to petitioner Lee's claim (81-1408 Pet. 16-21) that his oral statement was improperly admitted at trial because he was interrogated in violation of *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The district court expressly found that petitioner Lee had been given his Miranda warnings at the time of his arrest and again at the police sta-

tion; that he understood those rights; and that he had knowingly waived those rights (II Tr. 2-6). Accordingly, the district court properly admitted petitioner Lee's statements that were made before he requested an end to the interview. Petitioner Lee has failed to demonstrate that these findings of fact are clearly erroneous.[7]

7. Finally, petitioners O'Brien and Brown contend (81-1014 Pet. 52-59; 81-1296 Pet. 18-21) that the prosecutor's remarks during closing arguments denied them a fair trial. The court of appeals properly rejected this claim. Petitioners made no objection to these comments at trial, and the district court's instructions fully informed the jurors as to the limitations they should place on the attorneys' arguments (III Tr. 299-300). Thus, any overzealous characterization of petitioners[8] was neutralized by the court's instructions and the prosecutor's own comment that his statements were not evidence (III Tr. 194-198). In any event, the comments were neither outrageous nor plain error. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 239-240 (1940); *United States* v. *Medel*, 592 F.2d 1305, 1314-1315 (5th Cir. 1979); *United States* v. *Juarez*, 566 F.2d 511, 516-517 (5th Cir. 1978); *United States* v.

---

[7] Petitioner's reliance on *Edwards* v. *Arizona*, 451 U.S. 477 (1981), is misplaced. There the defendant explicitly stated that he wanted an attorney during interrogation. No such assertion was made in the present case prior to the making of the incriminating statements. Lee contends only that one of the petitioners requested a lawyer, but does not suggest that he was the one who did so.

[8] The prosecutor's comments concerning the expert witness and his fees merely restated facts already in evidence (II Tr. 280-281).

Wolfson, 322 F. Supp. 798, 826-827 (D. Del. 1971), aff'd, 454 F.2d 60 (3d Cir.), cert. denied, 406 U.S. 924 (1972).

Contrary to petitioners' contention, the prosecutor's comments concerning the informant and agents did not request the jury to reward them for their efforts with a guilty verdict irrespective of the evidence,[9] nor did he imply that the government had additional information not before the jury.[10] Thus, in the context of the entire trial, where the direct evidence against petitioners was so strong that the absence of the challenged comments would not have changed the jury verdict, such comments did not unfairly prejudice petitioners. See *United States* v. *Willis*, 621 F.2d 744, 745 (5th Cir. 1980); *United States* v. *Giese*, 597 F.2d 1170, 1199-1200 (9th Cir.), cert. denied, 444 U.S. 979 (1979).[11]

---

[9] *United States* v. *Serrano*, 496 F.2d 81 (5th Cir. 1974), and *United States* v. *Brown*, 451 F.2d 1231 (5th Cir. 1971), do not require a different result in this case. In those cases the prosecutors stressed the dangers that the agents had encountered in their undercover operations and the success of undercover operations in catching criminals. This was clearly not the import of the prosecutor's statements in the present case.

[10] Petitioner O'Brien's reliance on *United States* v. *Drummond*, 481 F.2d 62 (2d Cir. 1973) and *United States* v. *Lamerson*, 457 F.2d 371 (5th Cir. 1972), is misplaced. In *Drummond*, the conviction was reversed because of the repeated misbehavior of a particular prosecutor in that case and prior cases. Similarly, in *Lamerson*, a case in which proof of guilt was not overwhelming, the prosecutor stated that the defendant would not have been prosecuted unless he was guilty, and implied that he had additional information concerning the truthfulness of the testimony of government witnesses.

[11] When viewed in proper context, it is clear that the prosecutor's remarks did not in any way attack the integrity of

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

CAROLYN L. GAINES
Attorney

MARCH 1982

---

defense counsel. In fact, the prosecutor praised them by stating that they were the "most eminent members of the criminal bar," that they had "done a very fine job," and that it was a "pleasure" trying a case against them (III Tr. 194).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 369990 843